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IN THE

Supreme Court of the United States

October Term, 1969
No. 945

CLAUDE S. GOSSETT, KATHERINE MAY GOSSETT, CHARLES D. WILLIAMS and BONNIE WILLIAMS,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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CLAUDE S. GOSSETT, etc, and CHARLES O. WILLIAMS, *et al.*,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioners, Claude S. Gossett, Katherine May Gossett, Charles D. Williams and Bonnie Williams, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on September 11, 1969.

Opinions Reported.

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. The opinion of the District Court for the Central District of California also not yet reported, appears in the Appendix hereto.

Jurisdiction.

The judgment of the Court of Appeals for the Ninth Circuit was entered on September 11, 1969. No petition for rehearing was filed and this petition was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Questions Presented.

1. Is it necessary in an action for ejectment arising in California for the defendant to establish his own title or may he rely on the weakness of the plaintiffs' title?

2. Did petitioners fail to meet the requirements of the 1963 amendment to Rule 56(e), F.R. Civ. P. (See Appendix) by failing to present the defense that they had acquired title from California by operation of law?

3. Did the Circuit Court err in finding that the United States had *prima facie* title in the subject river bed land based upon self-serving Executive Orders withdrawing the land from public entry, issued in 1929 and 1931, in view of California's historic acquisition of the river bed in 1850 under the "Equal Footing Doctrine"[1] upon her entry into the Union?

4. Did the Circuit Court misconstrue California law concerning prescriptive rights in state public lands not reserved for or devoted to some specific public use?

5. Did the Circuit Court err in stating "California owns to the low water mark?"

6. Did the Circuit Court err in finding that there was no genuine issue of material fact disclosed by the record below?

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[1] *Shiveley v. Bowlby*, 152 U.S. 1.

Statement of the Case.

This is an action instituted by the United States framed in ejectment to remove the petitioners, Gossett and Williams, from subject lands and for damages for past use and occupancy of the subject land by the petitioners. The jurisdiction of the District Court was invoked under 28 U.S.C. §1345.

The lands involved are located near Blythe, California on the California side of the present flow channel of the Colorado River. Petitioners, Gossett, purchased their land for $32,000.00 in 1957 and have continuously occupied and greatly improved the land since that time. The petitioners, Williams, purchased their land for $16,000.00 in 1952 and have continuously occupied and greatly improved the land since that date. Both parties received quitclaim deeds from parties occupying the land at the time of the purchases. None of the petitioners or their predecessors in interest have patents or other written grants from the United States or from the State of California.

The subject lands lie entirely within the bed of the Colorado River, a navigable nontidal stream, as it flowed prior to the closing of the flood gates of Hoover Dam in 1933. Since the closing of Hoover Dam, the Colorado River in the area of subject lands has been little more than a canal, controlled by the United States and shifted by the United States to whatever position it chooses. The land of petitioners, Williams, borders the present flow channel and the land of petitioners, Gossett, is a short distance away from this channel.

All of the parties agreed that "on admission to the Union in 1850 title to the land either remained in the

United States or passed to California if located in the bed of the Colorado River." See page 5 of the Appendix hereto. Subject property was in the bed of the Colorado River when California was admitted and remained so at least until closing of Hoover Dam.

The land in question now lies outside of the flow channel of the river as a result of the regulation of the river by Hoover Dam.

The record shows no evidence that subject lands were ever reserved for or devoted to any specific public use.

Executive orders were issued in 1929 and in 1931 purporting to withdraw a large tract, including subject land, from public entry.

Petitioners have asserted their present ownership of subject lands both in affidavits and in interrogatories prior to the entry of Summary Judgment by the District Court.

Following the District Court's Order Pursuant to Pretrial, the State of California was made a defendant. California filed an answer disclaiming title in or right to possession of the subject property. Subsequently, the United States moved for a judgment on the pleadings as to possession, or in the alternative, a summary judgment as to possession only. The Court of Appeals affirmed.

REASON FOR GRANTING THE WRIT.

I.

The Decision Below Conflicts With Decisions of the Supreme Court of the United States and the Supreme Court of California on the Issue of Whether a Plaintiff in Ejectment Must Stand on the Strength of His Own Title Rather Than Rely on the Weakness or Want of Title in the Defendants.

The Ninth Circuit relied on *Greenleaf v. Birth,* 6 Pet. 302 at 312 (1832) for a ruling that it was incumbent upon the defendant in an ejectment case to make known the source of his title. See pages 5 and 6 of Appendix hereto. In so holding, the Court conceded that this was "an exception to the rule." See page 5 of Appendix hereto. In a long line of cases decided since *Greenleaf v. Birth,* the Supreme Court of the United States has consistently taken the view that the plaintiff in an action for ejectment must rely on its own title, not upon the weakness or absence of title in the defendant. *Field v. Seabury,* 19 How. 323; *Morehouse v. Phelps,* 21 How. 294; *Dunbar v. Green,* 198 U.S. 166; *McGuire v. Blount,* 199 U.S. 142; *Reynolds, Morrison v. Iron Silver Mining Co.,* 116 U.S. 687; *Osborn v. Froyseth,* 216 U.S. 471. The Ninth Circuit's ruling is directly contrary to the law of California as stated by the Supreme Court of that state in *City & County of San Francisco v. Brown,* 153 Cal. 644 and more recently by the Court of Appeals in *Central Savings Bank of Oakland v. Lake,* 62 Cal. App. 588.

II.

In Finding That California Took Only to the Low Water Mark, the Circuit Court Ignored the Fact That California Had Owned to the Ordinary High Water Mark for Twenty-Two (22) Years Before the Passage of California Civil Code Section 830 and Also Ignored the First Fourteen (14) Words of the Statute.[2]

The basis for the holding below that California took only to the low water mark in the Colorado River bed is Section 830, enacted 1872. When California entered the Union in 1850, she took the bed of the Colorado River to the western ordinary high water mark by virtue of the "equal footing doctrine" (*supra*). This was the *grant* under which California became the owner, and under it, California became owner to the high water mark. The United States then and there surrendered title up to the high water mark. The language of the statute clearly indicates that the legislature was intending prospectively to apply the low water mark rule only where some other intent was not clear at the time of transfer of title. The cases cited by the Circuit Court refer to transfers occurring after the passage of the statute. The acquisition of title by California had been completed for twenty-two (22) years when Section 830 was enacted and the intent in 1850 was clear. California took to the high water mark and Section 830 did not change the property line between the State and the United States.

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[2]*Except where the grant under which the land is held indicates a different intent,* the owner of the land . . . when it borders upon a navigable lake or stream, where there is no tide . . . takes to the edge of the lake or stream, at low water mark . . ." (Emphasis added).

III.

The Circuit Court Was Fatally Inconsistent in Accepting California's Disclaimer of Any Interest in Subject Land (See Page 7 of Appendix Hereto) and Then Holding That Petitioners Were Barred From Asserting Prescriptive Rights on the Theory That the Land Is Dedicated or Held for Public Use. See Page 7 of Appendix Hereto.

The Circuit Court in rejecting the defendants' assertion (in argument before the Circuit Court) that petitioners had acquired title from California by adverse possession relied on the statement that ". . . the California Courts have uniformly held that the land owned by the State, or its subdivisions, which is dedicated or held for public use is not subject to loss by adverse possession." See page 7 of the Appendix hereto. All of the cases cited by the Circuit Court for this proposition refer to specific dedication for a particular public purpose. *City of San Diego v. Cuyamaca Water Co.,* 209 Cal. 105, refers to water rights and a city-owned water course. *City of Oakland v. Burns,* 46 Cal. 2d 401, deals with an airport. *Sixth District Agricultural Association v. Wright,* 154 Cal. 119, has reference to lands being used for agricultural exhibits and a county fair. *City of Los Angeles v. Anderson,* 206 Cal. 662, discusses reclaimed tideland. In each of these cases the public land was the subject of a special dedication to a specific public use. There was no evidence before the Ninth Circuit that any of subject land had ever been devoted to any particular public use. The cases cited sustain rather than deny the petitioners' prescriptive rights against California acquired through continuous occupancy for the statutory period. *Califor-*

nia Code of Civil Procedure, Section 315.[3] If California really does not own the land, there is no dedication or holding for public use. If California does own the land, it has never dedicated nor held the land for the type of specific public use which prevents loss by prescription. Obviously if California owns the land, no matter how it uses it, the plaintiff, United States, cannot maintain an action for ejectment.

IV.

A Genuine Issue of Material Fact Exists as to Whether Subject Land Was in the River Bed of the Colorado River in 1850 and as to Whether Subject Land Remained a Part of the River Bed Throughout the Natural Changes of the River Over the Years.

All parties agree that "on admission to the Union in 1850, title to the land either remained in the United States or passed to California if located in the bed of the Colorado River." See page 5 of Appendix hereto. It is absolutely essential to determine whether subject land was in the bed of the river in 1850. If the movements of the river have resulted in the land now being out of the bed of the river, then it is essential to determine the factual issues concerning movement of the river.

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[3] §315. *Actions by people*

WHEN THE PEOPLE WILL NOT SUE. The people of this State will not sue any person for or in respect to any real property, or the issues or profits thereof, by reason of the right or title of the people to the same, unless:

1. Such right or title shall have accrued within ten years before any action or other proceeding for the same is commenced; or,

2. The people, or those from whom they claim, shall have received the rents and profits of such real property, or of some part thereof, within the space of ten years. (Enacted 1872.)

Therefore, summary judgment should not have been granted because there existed genuine issues of material facts.

V.

The Decision Below Is of Critical Importance to the Lives of Residents of the Colorado River Valley From Hoover Dam to the Mexican Border.

Between 200,000 and 300,000 acres of land lie in the area that was the bed of the Colorado River prior to the establishment of man made controls. Ownership to this whole area is put in jeopardy by the Circuit Court's decision. The United States has filed ejectment actions in the District Court against more than fifty (50) settlers known to petitioners and has threatened suit against literally hundreds more. Several thousand persons face loss of homes, farm lands, businesses and complete disruption of their lives if the decision is not revised.

Conclusion.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

December 9, 1969.

Respectfully submitted,

ZETTERBERG & GEORGE,
ROBERT A. STAFFORD,
Counsel for Petitioners.

APPENDIX.

Opinion of the United States Court of Appeal for the Ninth Circuit.

United States Court of Appeals, for the Ninth Circuit.

United States of America, Plaintiff-Appellee, vs. Claude S. Gossett, et ux, Defendants-Appellants. No. 23,162.

United States of America, Plaintiff-Appellee, vs. Charles D. Williams, et al., Defendants-Appellants. No. 23,163.

[September 11, 1969]

Appeal from the United States District Court
Central District of California

Before: MERRILL and ELY, Circuit Judges, and KILKENNY, District Judge*

KILKENNY, District Judge:

Before us for review is the action of the District Court in granting summary judgments to plaintiff. Discovery procedures, including affidavits and interrogatories, were extensively employed. We affirm.

Involved is the title and right to possession of lands located in California, west of the present flow of the Colorado River. The runaway waters of this once unpredictable and highly destructive river have left in their wake a substantial body of law. For example, *Arizona v. California,* 373 U.S. 546 (1963); *United States v. Arizona,* 295 U.S. 174 (1935); *Arizona v.*

*The Honorable John F. Kilkenny, United States District Judge for the District of Oregon, sitting by designation.

California, 298 U.S. 558 (1936). The river's catastrophic force was harnessed and its channel stabilized in 1935 by the completion of giant Hoover Dam.

The lands here under scrutiny were ceded to the United States by Mexico in 1848 by the Treaty of Guadalupe Hidalgo, 9 Stat. 922. The river in the area with which we are concerned is navigable, but non-tidal. California was admitted to the Union in 1850 and thereby acquired ownership of the bed of the river, west of the middle of the channel.[1] The land claimed by the Gossetts is located immediately south of the city of Blythe. The Williams land is located approximately 20 miles north of that city. The Williams land, except for a slough, is not within the present flow channel of the river, while the easterly edge of the Gossett land is approximately 3500 feet west of the present channel. Williams has been in possession since 1957, Gossett since 1952. Each claims under a quit-claim deed, from a stranger to the title.

The Boulder Canyon Project[2] was authorized by the Act of Congress dated December 21, 1928, 45 Stat. 1057. By Executive Orders dated February 19, 1929, and October 16, 1931, each issued pursuant to the Act of June 17, 1902, 32 Stat. 388, the lands here in dispute were withrdawn from public entry. Without question, these Orders were issued in implementation of the exigencies created by the Boulder Canyon Project. The United States, by an undisputed affidavit, shows that it has never disposed of the property in question. Neither appellant attempted to trace title to the United States.

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[1]Stat. 452. *United States v. California,* 332 U.S. 19, 41-42 (1947).

[2]43 U.S.C. §§ 617, *et seq.*

Early in the proceedings, the appellants claimed title through the state of California. Thereupon, the Court entered an order joining that state as a party defendant. The state disclaimed all title in, or right to possession of, the property. Subsequently, the United States moved for judgment on the pleadings or, in the alternative, a summary judgment.[3] The Court treated the motion as one for a summary judgment, as evidenced by its consideration of all of the records and files. The motion was allowed and the judgment is the subject of this appeal.

Appellants' main contention seems to be that title was once lodged in the State of California. They argue that the land was below the high water mark of the river at the time California entered the Union and remained part of the bed and below the high water mark until 1935 when Hoover Dam was completed. In some mysterious manner, not disclosed by the record, they claim title from California. In the final analysis, our decision must rest on whether the record discloses a genuine issue of material fact.

To properly approach this problem, we must apply and give full effect to the 1963 Amendment to Rule 56(e).[4] The Advisory Committee notes show that the

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[3]FRCivP 12 (c). ". . . If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

[4]FRCivP 56 (e). ". . . When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

amendment was added to overcome a line of Third Circuit cases which severely crippled the effective use of the summary judgment device. These cases consistently held that summary judgment could not be granted if an issue of fact was raised by the pleadings. *Frederick Hart & Co. v. Recordgraph Corp.*, 169 F.2d 580 (3rd Cir. 1948); *United States for Use of Kolton v. Halpern*, 260 F.2d 590 (3rd Cir. 1958); *Jamison v. Pennsylvania Salt Mfg. Co.*, 22 F.R.D. 238 (W.D. Pa. 1958). The Delaware District Court joined the parade in 1961. *United States v. Ivey Bros. Constr. Co.*, 191 F. Supp. 383 (D. Del. 1961).

The obvious purpose of the amendment was to require a party opposing a summary judgment to set forth specific facts showing a genuine issue for trial, thus strengthening this procedural tool as a means to eliminate sham issues of fact and, in this manner, avoid otherwise lengthy trials. *United States v. Prince*, 348 F.2d 746 (2d Cir. 1965); *Neff v. World Publishing Co.*, 349 F.2d 235 (8th Cir. 1965); *Jacobson v. Maryland Casualty Co.*, 336 F.2d (8th Cir. 1964), *cert. denied* 379 U.S. 964 (1965). Our own analysis of the '63 amendment was recently outlined in *McGuire v. Columbia Broadcasting System, Inc.*, 399 F.2d 902, 903-905 (9th Cir. 1968), thusly: ". . . the showing of a 'genuine issue for trial' is predicated upon the existence of a legal theory which remains viable under the asserted version of the facts, and which would entitle the party opposing the motion (assuming his version to be true) to a judgment as a matter of law. The question to be resolved is whether there is 'sufficient evidence supporting the claimed factual dispute . . . to require a jury or judge to resolve the parties' different

versions of the truth at trial.'" Of similar import is *First Nat'l Bank v. Cities Service,* 391 U.S. 253, 288-289 (1968).

All parties agree that on admission of California to the Union, the title to the land either remained in the United States or passed to California if located in the bed of the Colorado. From time to time thereafter, the boundary between the land owned by the United States and land owned by the state of California moved east and west as the bed of the river wandered back and forth. *Beaver v. United States,* 350 F.2d 4 (9th Cir. 1965).

There is no contention that appellants' claims fall within the purview of the Color of Title Act, 43 U.S.C. §§ 1068, et seq. For that matter, on the record before us, such a claim could not be asserted. *Beaver v. United States, supra,* p. 10.

Appellants argue that at least a substantial portion of the property was the bed of the Colorado River when California was admitted and remained so until the completion of the Dam. Then they assert that a plaintiff in ejectment actions, such as these, must stand on the strength of his own title, rather than on the weakness or want of title in the defendants. Citing *McGuire v. Blount,* 199 U.S. 142 (1905); *City & County of San Francisco v. Brown,* 153 Cal. 644, 96 Pac. 281 (1908), among others, appellants urge that their titles might be traced to the state of California and that they were entitled to jury trials on the alleged issues.

The rule employed by appellants is not of universal application. An exception to the rule, on a record such as we have before us, is well stated by the United

States Supreme Court in *Greenleaf v. Birth,* 6 Pet. 302, 312 (1832). There, the Supreme Court held that it was not incumbent on a plaintiff who had *prima facie* good title to establish the non-existence of an outstanding title, but it was the duty of the defendant to make known the source of his title. In the absence of proof to the contrary, the legal presumption is that the title remains in the United States. *Patterson v. Tatum,* 18 F. Cas. 1331 (C.C. Cal. 1874). The fact that the Executive Orders, withdrawing this land from public entry, were issued in 1929 and 1931 is convincing evidence that the Government was claiming ownership and exercising dominion over the property in those years. Here, the Government had *prima facie* title.

Be that as it may, the procedural rule on which appellants rely is now confronted with the positive directives of the 1963 Amendment to Rule 56(e). No longer may a defendant, under Federal practice, play a game of hide and seek, refuse to show his hand, and thus place on the trial court and the opposing party, the unnecessary burden of facing a long, arduous and expensive trial. The onus is now placed on a defendant, under circumstances such as these, to come forward with evidence showing the existence of a genuine issue of material fact.

Assuming, *arguendo,* that title once rested in the state of California, still no attempt is made to show how appellants obtained title from that state. The title could only be obtained by one of two means: (1) by grant from the state, or (2) possibly by adverse possession. The record before us is completely devoid of evidence even remotely pointing to a grant from the state of California. The fact that California disclaims

all ownership to the property is of great significance. We may assume that official duty has been regularly performed and that The Attorney General of the state, who is charged with the duty of defending the state's title to land,[5] would not violate his duty and file an answer disclaiming all title in, or ownership of, the property. Even if California had not been joined as a party and had not filed a disclaimer, appellants would still be confronted with the requirements of the 1963 Amendment. If there exists a patent, or other evidence of a grant from California, the appellants, under the requirements of the '63 Amendment, had the burden of coming forward with such proof. This they have failed to do.

Appellants vaguely suggest that title might have been acquired by adverse possession. Again, compliance with the '63 Amendment is not established by suggestion or creation of suspicion. An issue of material fact must be created. They do not rely on this theory in their briefs, but are content to rest on the common law doctrine that the plaintiff in ejectment must rely on the strength of his own title, rather than on the lack of title in defendants. Under California law, a claimant has a heavy burden in establishing title by adverse possession. *Dimmick v. Dimmick,* 24 Cal. Rptr. 856, 374 P.2d 824 (1962).

Aside from the above, the California courts have uniformly held that land owned by the state, or its subdivisions, which is dedicated or held for public use is not subject to loss by adverse possession. *City of San Diego v. Cuyamaca Water Co.,* 209 Cal. 105, 287

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[5]California Gov. Code, § 12512; *In re Quinn's Estate,* 156 Cal.App.2d 684, 320 P.2d 219 (1958).

P. 475 (1930); *City of Oakland v. Burns,* 46 Cal.2d 401, 296 P.2d 333 (1956); *Sixth Dist. Agr. Assn. v. Wright,* 154 Cal. 119, 97 Pac. 144, 149 (1908) (Tidelands); *City of Los Angeles v. Anderson,* 206 Cal. 662, 275 Pac. 789 (1929) (Tidelands). Of course, adverse possession does not run against the United States. *United States v. California,* 332 U.S. 19, 39-40 (1947); *Utah Power & Light Co. v. United States,* 243 U.S. 389, 408-409 (1917). In the record before us there is not a scintilla of proof that the property was used in a manner which would permit the acquisition of title by adverse possession.

Many other issues of fact are argued by appellants. These we brand as non-genuine and immaterial. The same may be said of most of the alleged issues of law; for example, the issue of whether California owns, or owned, to the high or the low water mark on navigable streams. California had a choice and adopted the low water mark. *Craig v. White,* 187 Cal. 489, 202 P. 648 (1921); *Anderson v. Trotter,* 213 Cal. 414, 2 P.2d 373 (1931); *City of Los Angeles v. Aitkin,* 10 Cal.App.2d 460, 52 P.2d 585 (1935); *Crews v. Johnson,* 202 Cal. App.2d 256, 258, 21 Cal.Rptr.2d 37 (1962). Cases such as *Churchill Co. v. Kingsbury,* 178 Cal. 554, 174 Pac. 329 (1918); *Yolo Water & Power Co. v. Edmands,* 50 Cal. App. 444, 195 P.2d 463 (1920) and *Perry v. State,* 139 Cal.App.2d 379, 293 P.2d 480 (1956) either involve gratuitous statements (*Churchill*), elimination of the issue (*Yolo Water*), or tidal waters. California owns to the low water mark.

If, in fact, appellants were invited by an agency of the Government to make improvements and expend money in improvements on the property, the remedy lies with the Congress, rather than the Courts.

We conclue that appellants have presented no genuine issue of material fact and that the judgment of the lower court must be affirmed.

United States District Court, Central District of California.

Filed, Jun. 6, 1968.

United States of America, Plaintiff, vs. Claude S. Gossett and Katherine May Gossett, Defendants, No. 64-1758-HW.

United States of America, Plaintiff, vs. Charles D. Williams, et al., Defendants. No. 65-812-HW.

AMENDED MEMORANDUM AND OPINION.

On December 4, 1967 the Court made an Order, pursuant to pretrial, in the above-entitled matter which in part provided that the State of California be made a party of these proceedings.

As set forth in the Court's Order the defendants are

> "* * * trespassers—either upon land owned by the United States of America or upon land belonging to the State of California."

Defendants herein assert no title to the land in question. Their only defense is that the United States cannot maintain the present action because the land in question belongs to the State of California.

At the conclusion of the war between Mexico and the United States the treaty of Guadalupe Hidalgo was signed, by which Mexico ceded to the United States all of its territory north of the Rio Grande and Gila

Rivers and all of Alta, California. By the treaty, the United States became owner of the lands in question.

However, upon admission to the Union of the State of California there was transferred to the State, according to custom, the lands beneath the navigable rivers in California. As the Colorado River was a navigable river, the State of California thus became the owner of the land beneath the Colorado River as it then flowed on the California side.

No attempt was made to designate the lands in question by meets and bounds or otherwise although it was recognized that the Colorado River was a meandering river flowing at various places between the mesa or bluffs of Arizona and California.

Subsequent to service herein the State of California filed its Answer and alleges that as between the United States and the State of California, the United States is the owner of and entitled to the exclusive possession of the land in question. California also alleges that it

> "does not own said Section 35, nor any part thereof, nor any accretion thereto, in its sovereign capacity as the owner of the beds of navigable bodies of water within said State."

The sole defense that the defendants have advanced is that California is the owner of the premises in question; therefore, as California denies ownership and right of possession, the defendants' defense must fail.

This problem was presented to the Supreme Court of the United States in 1832 in the case of James Greenfield's Lessee vs. James Birth, 31 U.S. 302 (6 Peters, 302). That also was an ejectment case and the defend-

ant in that case defended upon the ground that the property in question was owned by a third party. The plaintiff contended,

> "* * * that a defendant in the ejectment cannot protect himself under an outstanding title, with which he is in no manner connected." (page 306)

The Supreme Court said:

> "The defendant sets up no title in himself, but seeks to maintain his possession as a mere intruder, by setting up a title in third persons, with whom he has no privity. In such a case, it is incumbent upon the party setting up the defence, to establish the existence of such an outstanding title, beyond controversy. It is not sufficient for him to show, that there may possibly be such a title; if he leaves it in doubt, that is enough for the plaintiff; he has a right to stand upon his prima facie good title, and he is not bound to furnish any evidence to assist the defence. It is not incumbent on him, negatively, to establish the non-existence of such an outstanding title; it is the duty of the defendant, to make its existence certain." (page 312)

Plaintiff herein has made a Motion for Judgment on the Pleadings. Inasmuch as the State of California has denied ownership to the lands in question, defendants cannot maintain this action upon the supposition that defendants *may* own the property notwithstanding their denial.

The plaintiff's motion for judgment on the pleadings is granted. Counsel for the plaintiff is directed to prepare Findings in accordance herewith.

DATED this 6th day of June, 1968.

Rule 56(e) of Federal Rules of Civil Procedure.

(e) *Form of Affidavits; Further Testimony; Defense Required.* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.